VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

BEIRNE STEDMAN, *Associate Editor.*

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS

Through the courtesy of the Michie Company Volume 123 of the Virginia Reports has been laid on our table. Sixty-nine cases are reported—sixty-three civil and six criminal. Thirty-four are affirmed, twenty-six reversed. Two are dismissed and in one a petition for a writ of *habeas corpus* is granted. Of the criminal cases four are affirmed and two reversed. Of these cases four are for violation of the Prohibition Law and are from Russell and Wise counties and the City of Roanoke; one is reversed the others affirmed. The other two cases are for murder—one from Washington County, Canter's Case and the other from Scott County, Stapleton's case. Canter's was reversed and Stapleton's affirmed. Canter's case was one of the most remarkable in the State. Canter and his brother Luther were accused of the murder of Mrs. Wilson. The brother was convicted and duly executed. The former was tried *six* times —the jury having disagreed in five trials, and on the sixth he was convicted of murder in the first degree. He appealed and the Commonwealth did not appear in the Appellate Court—very properly, we think, for had the Commonwealth appeared it would have had to do what it did in one of the previous trials, i. e., confess error. The Supreme Court reversed the lower court and set the verdict aside, remanding the case "to be disposed of according to law."

123rd Virginia.

We are struck with the number of short opinions in this volume and in no single instance can we see why they should have been lengthened. They are terse, clear and to the point in every instance. We think the profession and the Court are to be congratulated upon the fact—that when no new principle of law is to be stated there should be no attempt to re-state well-fixed

principles. Of course the facts in a case often render an opinion lengthy but long quotations and citations of numerous authorities seem to us to inflict useless labor upon the court and the Bar, except when necessary to elucidate new propositions.

Directing Verdicts. Federal and State Practice.

In the case of *Barrett* v. *Virginian Rwy. Co.*, 39 Sup. Ct. Rep. 540, decided June 9th, 1919 by the Supreme Court of the United States, the decision of the Court of Western District of Virginia was reversed on a question of some interest. In accordance with the Federal practice the Judge of the District Court directed a verdict for the defendant, and thereupon the plaintiff moved the Court to be allowed to take a voluntary nonsuit; which motion the Court refused on the ground that it came too late, and directed the jury to find for the defendant, which was done. The plaintiff excepted and the case coming to the Supreme Court on a writ of certiorari from the United States Circuit Court of Appeals for the fourth circuit, which affirmed the judgment of the lower court, the Supreme Court reversed the decision and remanded the case, with directions to set aside the verdict and allow the nonsuit to be entered.

Mr. Justice McReynolds, who delivered the opinion of the Court, set out at some length the Virginia practice on demurrers to evidence, directing of verdicts, etc.

He again reiterates what to us has always seemed the very ingenious way in which the Federal Courts have got around the Conformity Act of June 1st, 1872 (Rev. Stats. Sec. 914, Chap. 255, Sec. 517 Stat. at L. 197 Comp. Stat. 1916, Sec. 1537 6 Fed. Stat. Anno 2nd ed. p. 21. That Act is as follows: "The practice, pleadings and forms and other modes of proceeding in civil causes other than in equity and admiralty causes in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state, within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*" (Italics ours.) Now

in our humble judgment if language means anything this would mean that any practice expressly forbidden in a state court would be also forbidden in the Federal Court of that state. Now the practice of the judge directing a verdict has always been questioned in this State and is now directly forbidden by statute. The demurrer to evidence takes its place. Therefore it has always seemed to us that the habit of the judge in a Federal Court in Virginia in directing a verdict was in violence of the conformity act. But as far back as 1875, in the case of *Nudd* v. *Burrows,* 91 U. S. p. 426, the Supreme Court "non-conformed" the conformity act by holding that "the personal conduct and administration of the judge in the discharge of his separate functions is neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context." See also *Indianapolis & St. L. R. R. Co.* v. *Horst,* 93 U. S. 291.

Of course the discussion of the question is purely academic now, but if the action of a judge in directing a verdict is not "practice" it is certainly a "mode of proceeding," by which a suitor is thrown out of court. It is admitted to be a rule of court—for Mr. Justice McReynolds in his opinion refers to it as "a well settled rule in the courts of the United States," and again, "This *rule* (italic ours) is not subject to modification by state statutes or constitutions." We would then most respectfully ask what becomes of the clause in the United States Conformity Act "any rule of court to the contrary notwithstanding?" If it is a rule and the learned judge admits it is, then it is contrary to the State practice and is therefore expressly within the prohibition of the Conformity Act.

But there is no use in "kicking." As the old colored janitor of that august court told a gentleman who was a little too loud in his conversation: "Better keep quiet, sir; for you mus' remember that there ain't nothin' between you and this co't but Gawd." The court upholds the Virginia statute—Sec. 3387 Va. Code—which allows a nonsuit to be taken at any time before the jury retires from the bar, but not after, although until that statute was passed the plaintiff had an absolute right to take a nonsuit at any time before a verdict.

This case disposes of the conclusion announced in *Parks* v. *Southern R. Co.,* 74 C. C. A. 414, holding that because Federal courts may in proper cases direct verdicts, therefore in the exercise of sound discretion they may deny an application for leave to take a nonsuit and direct a verdict for defendant, is not well founded.

But, why not? Is denying an application for a nonsuit any less "personal administration by the judge whilst sitting upon the bench" than directing a verdict? And is the Virginia statute prohibiting the direction of a verdict any less the law than that permitting a nonsuit before the jury retires?

Directing Verdicts in Virginia.

Of course this cannot be done under our Statute Chapter 27 Va. Acts 1912, p. 52, but our Supreme Court of Appeals in the case of *Small* v. *Va. Rwy. &c. Co., 99* S. E. 525 decided June 11th, 1919, in reversing the lower court for a very unfortunate remark of the judge in the presence of the jury, practically directing a verdict, enters into a very interesting history of our law on this subject well worthy of perusal.

This remark of the Court was in reply to a question by counsel for plaintiff, "Does the Court mean that under no circumstances there can be a recovery against the Virginia Railway & Power Company?" To which the Court replied: "Yes, as I have already told you, you cannot recover a verdict against the Virginia Railway & Power Company;" to which remark of the Court counsel for plaintiff promptly excepted and very wisely let a verdict go without any argument.

Our court says: "It is doubtful indeed whether a peremptory instruction in writing, without the somewhat dramatic setting presented in this case would have had a more controlling effect upon the jury."

At the risk of seeming in hopeless oppositior to fixed rules of law we must say that we think our statute i a most unfortunate one. The truth of the matter, we are inclined to think, is that the future student of Virginia jurisprudence, say in the year 2119, will come to the conclusion that our State must have

had during the first century and a half of its existence either a very tyrannical, very corrupt or very ignorant judicial department, as far as our lower courts were concerned; for there has been a steady, increasing and very noticeable indication of a purpose on the part of the Legislature to curtail the power of our judges and reduce them to mere presiding officers, to keep order and confuse juries with instructions nearly altogether drawn by counsel on both sides and flung at the court during the concluding hours of cases. Witness our "Contempt acts"—the statute just referred to, and the curb our own Supreme Court has often felt obliged—following the trend of Legislative and public opinion—to put upon the lower courts.

Now we say without fear of successful contradiction that a more useless statute was never put upon our statute books than that checking our judges in contempt proceedings and that in no commonwealth in the world were, and are, judges who misused their power in contempt proceedings less, or who were fairer, more impartial, or more eager to do justice than our Virginia judges, Supreme and Subordinate. Other commonwealths may have had abler judges—though we doubt it—but none purer, higher men, or men more desirous to do their duty. And yet they are to a certain extent figure heads. We deem this exceedingly unfortunate. In a practice extending now well nigh on to forty-five years we have noticed a very distressing augumentation of mistrials. Over and over again we have seen a very badly confused jury retire to their room "to consider of their verdict," with a certain knowledge on our part that there would be no consideration and less judgment. A few words from the judge—in no way directing a verdict—could have easily untangled the web in which it was plain the jury was enmeshed. But the judge did not dare to open his mouth, knowing very well that the losing side was only too eager to find some way to avoid a verdict and take another chance, and after a long and weary waiting the twelve men came down, all angry, with evidences of wrangling and disputes in their "consideration" and all the expense and labor have to be gone over again and the valuable time of the court and public wasted. This jealousy of our judiciary—this fear of their usurping power, is unworthy alike of

the bar and the public. We need not expect better jury service and more expedious administration of justice until we put in the hands of our judges more authority to "respond to the law," as well as to guide and direct the jury in the vexatious and confusing way in which the facts are presented to it.

The experiment might be worth trying, anyway for a short while. Certainly we might at least return to the state in which we found ourselves before the statute mentioned was passed, as laid down in Judge Burk's Pleading & Practice, Sec. 273, p. 506, quoted by the court in the instant case.

"The tendency, however, of modern cases leans towards permitting the trial court to direct a verdict, and it is said that 'while directing a verdict is not in accordance with the practice in this State! yet where it appears, as in this case that no other verdict could have been properly rendered, the error was harmless and judgment will not be reversed on that ground."

Privileged Communications.

In Lindsey *v.* People, 181 Pac. 531, the Supreme Court of Colorado decided that a juvenile court judge called as a witness is not entitled to have statements made to him regarded as privileged communications under section 7274 of the Revised statutes of Colorado which provides that

> "A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure."

A twelve year old boy told the plaintiff-in-error, Judge Ben B. Lindsey, of Juvenile court fame, that he had killed his father. Subsequently upon the trial of the boy's mother for the murder of the father he testified in her behalf and the prosecution called upon Judge Lindsey for the purpose of discrediting his testimony by showing that he had made admissions contrary to his sworn testimony. Judge Lindsey refused to testify to such admissions and was fined for contempt of court and the Supreme Court in the present case affirmed the conviction. The

court very properly held that, under the code section above quoted, the pesiding judge and not the witness, is the sole judge of the necessity of regarding the communication privileged.

Judge Bailey delivered a strong dissenting opinion which was concurred in by two of the judges. He said in part:

> "No more important and wholesome benefit in general is possible of attainment than that of making wayward and delinquent children clean, upright and useful citizens. That any relationship which tends to promote this highly desirable object should be encouraged goes as a matter of course. It is equally plain that anything which tends to destroy the trust of the child in the court which has jurisdiction over such matters must necessarily nullify all possibility of good which otherwise might thereby be accomplished. To permit the violation of a confidence made by a delinquent to the judge of the court having such matters in charge would at once remove the cornerstone of his faith in the one to whom he is authorized to appeal for help and protection. It may be that the broad powers and authority conferred by statute upon judges of juvenile courts are such that, in rare and exceptional cases, some judges may take advantage of them for ulterior motives, still, in determining the questions involved we are not dealing with isolated cases, or with any individual judge, but in a general way, with a most important system of jurisprudence, highly designed to promote the public welfare through the reclamation and betterment of delinquents, and which as maintained and ordinarily administered, is a vast power for good, concerning which no narrow construction should be indulged tending to weaken or discredit its work. In view of the wise and humanitarian object of the statute, which should be supported and upheld to the utmost legal extent, we are of the opinion that the communication in question falls within well recognized limitations governing privileged communications, and should, in the interest of the general good, be so treated by the courts."

While much might be said in favor of the view taken in the dissenting opinion still the holding of the majority opinion seems sound as the benefit to be gained by a correct disposal of the litigation was infinitely greater than any injury which could possibly inure to the relation between the boy and Judge Lindsey by the disclosure of the communication.

B. S.